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SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

BRIEF *of* PETITIONERS.

Opinions Below.

No formal opinion was written by the District Court of the United States for the Northern District of Oklahoma. However, the findings of fact and conclusions of law of that court, rendered December 21, 1944, are in opinion form and are found at page 57 of the record.

The opinion of the Circuit Court of Appeals for the Tenth Circuit, 156 F. (2d) 769, was rendered July 29, 1946 (R., p. 141). Petition for rehearing was denied on August 29, 1946 (R., p. 161).

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, U. S. C., Title 28, Section 347(a).

Federal questions are presented by the conflicting contentions of the parties as to:

(*1*) The application of the constitutional doctrine of equality of states;

(*2*) The construction of the decisions of the United States Supreme Court in *Wear* v. *Kansas,* (245 U. S. 154) and *Brewer-Elliott Oil and Gas Company* v. *United States,* (260 U. S. 77) and the related decisions upon which those cases were based;

(*3*) The construction of the various treaties between the United States and the Cherokee Nation, the Acts of Congress and Executive Orders with reference to the conveyances from the Cherokees to the Otoes and Pawnees, the Proclamation of the President of the United States opening the Cherokee Outlet for settlement, and the Federal patents to the various Indian allottees who are the real plaintiffs in this case, all of which will be considered fully in the following sections of the brief.

Statement of the Case.

This case is between the State of Oklahoma and private claimants to determine whether the bed of the Arkansas river at the location in controversy shall belong to the whole people of the state, or whether it shall be divided among the various private owners of the lands along the shore. In a larger sense, the case involves the right of the State of Oklahoma to exercise the same sovereignty and control over the beds of its rivers generally, as is enjoyed by the older states of the Union.

The Arkansas river is the second largest tributary of the Mississippi on its western side, being over 2,000 miles in length. It rises in the Rocky Mountains of Colorado and flows thence through the States of Kansas, Oklahoma and Arkansas making its juncture with the Mississippi River near the southern boundary of Arkansas. The Arkansas

River is typical of the principal rivers which flow through the western plains states. These rivers, though not actually navigable under the Federal test, carry tremendous volumes of water. They have broad beds, sometimes exceeding a mile in width, which are not adaptable to private ownership but are of great actual as well as potential value to the public.

The State of Oklahoma has long claimed title to the Arkansas River bed (except the portions thereof granted to Indian Tribes prior to statehood) by virtue of a decision of the Supreme Court of Oklahoma rendered in 1914, seven years after statehood,[1] in the case of *State* v. *Nolegs*, 40 Okl. 479, in which judicial notice was taken of the fact that the Arkansas River is navigable throughout the state, and that the bed of the river belongs to the State of Oklahoma. Supporting the state's declaration of navigability were the circumstances that the river was meandered in the original survey,[2] that the Arkansas River had previously been held to be navigable both in Oklahoma[3] and Kansas[4], and that the later legislation of the state confirmed the judicial rule.[5]

In spite of these *indicia* of navigability, it is not pre-

1. Oklahoma was admitted as a state on November 16, 1907.
2. Only navigable streams are authorized by the Federal statute to be meandered. Title 43, U. S. C. A., Sec. 751.
3. United States v. Mackey, (U. S. District Court, Eastern District of Oklahoma) 214 Fed. 137.
4. Dana v. Hurst, (Supreme Court of Kansas) 86 Kan. 947. This case was followed by the Federal courts in Kansas in Jackson-Walker Coal and Material Company v. Hodge, (U. S. District Court, District of Kansas) 283 Fed. 457, and Shore v. Shell Petroleum Corporation, (U. S. District Court, District of Kansas) 55 F. (2d) 696, affirmed by the Circuit Court of Appeals, 10th Circuit, 60 F. (2d) 1.
5. This decision was re-enforced by a statute, enacted in 1919 (Title 64, Okla. Stats. 1941, Sec. 209), covering generally, all streams of two chains or over in width. This statute reads as follows:

   "The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared property of the State of Oklahoma." (Laws 1919, ch. 206, p. 293, par. 1.)

tended that this river is navigable under the Federal test of actual navigability,[6] for this court in *Brewer-Elliott Oil and Gas Company* v. *United States,* 260 U. S. 77, held that the Arkansas River at this location is not navigable under the Federal laws. However, in its opinion in that case, this court took pains to explain that it was not overruling the time honored doctrine that the state law of navigability is controlling in the *determination of local land titles,* and expressly approved the general practice of the states of reserving control over beds of their rivers by declaring them to be navigable, although in the language of the court, "they are not actually so." In the same opinion the court expressly affirmed its prior holding in *Wear* v. *Kansas,* 245 U. S. 154, to the effect that the State of Kansas had the right to acquire title to the bed of the Kansas river by taking judicial notice of the navigability of such river, irrespective of the fact. Hence, it is entirely immaterial for the purpose of the present case whether or not the Arkansas River is actually navigable at the location in controversy. The only real issue in this action is whether the state determination of navigability is the governing law of the case.

Petitioners' Theory of the Case.

The State of Oklahoma contends that the state law of navigability should be accepted as controlling in the present action for the following reasons:

(*1*) The portion of the river bed here in controversy was part of the public domain at the time Oklahoma was admitted as a state and was never granted to the riparian

6. The Arkansas River is actually navigable below its confluence with the Grand River in Eastern Oklahoma, but such portion of the river is not involved in the present case. See Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77.

owners by the United States.[7] Although the river bed had been granted by the United States to the Cherokee Nation in 1828,[8] (at a time when it was not contemplated that a state would ever be formed in the Indian country),[9] this portion of the bed was later, in 1891, ceded back to the United States by the Cherokees with other lands[10] and in 1893 was declared by the President of the United States to be part of the public domain, in the proclamation in which he opened for settlement the lands in northern Oklahoma commonly known as the Cherokee Outlet or Cherokee Strip.[11]

When the land involved in the present action was surveyed by the Federal Government in 1872, the bed of the Arkansas River was meandered, and the lots which were platted on the river banks did not include any portion of the river bed.[12]

After the survey was made, and prior to Oklahoma

7. Title 43, U. S. C. 931, might appear on its face to dispose of beds of nonnavigable rivers, but this statute does not cover the public lands involved in this case. It is shown in the historical note following this section in U. S. C. A. that this statute was derived from the Act of May 18, 1796 (1 Stat. 468), and the Act of May 3, 1803 (2 Stat. 235). The Act of May 18, 1796, applied only to the territory northwest of the Ohio River; so held in St. Paul and Pacific R. Co. v. Schurmeier, 272 U. S. 290; Kean v. Calumet Canal and I. Co., 190 U. S. 1145; Packer v. Bird, 137 U. S. 663. The Act of May 3, 1803, did not mention the beds of nonnavigable streams and in any event it applied only to the old Mississippi territory south of the State of Tennessee and east of the Mississippi River.

8. 7 Stat. 311.

9. See treaty between United States and Cherokees 1828, 7 Stat. 311.

10. Kappler Indian Affairs, Law and Treaties, Vol. 1, pp. 496 to 498.

11. 28 Statutes at Large 1222. The history of the title will be set forth in detail in the argument, infra. The government contended, in the courts below that the Cherokees conveyed a portion of the river bed here in controversy to the Otoe Tribe and hence, that such portion was not a part of the public domain. However, neither the United States District Court nor the United States Circuit Court of Appeals sustained the government on this point, and it does not appear to be an important issue in the case. (The government's contention did not apply to the Pawnee lands.)

12. Prints of the official government surveys covering the two townships here in suit, as introduced in evidence, are inserted in the appendix of this brief as Exhibits "A" and "B." The survey shown as Exhibit "A" covers Township 23 N., Range 3 E. (Otoe lands). The survey shown

statehood, the Government patented the lots on the south bank of the river at the location in controversy to members of the Otoe and Pawnee tribes, including the lots involved in the present action.[13] These patents conformed to the lot lines as shown on the above described survey and did not convey any portion of the river bed, nor did they indicate any intention of defining riparian rights. Hence, when Oklahoma was admitted to statehood, the bed of the Arkansas River at the location here in suit remained a part of the public domain. The State of Oklahoma is therefore not attempting to take the river bed away from the claimants in the present action, because these claimants never received title to the bed. On the contrary the state is merely asserting ownership of property, the title to which has never been severed from the public.

(*2*) This court has held by a long line of decisions that where a Federal grant does not define the riparian rights which shall attach as an incident to the grant, such rights shall be determined by state law,[14] and that the same rule applies to Federal grants to members of Indian tribes.[15] Since the patents in the case at bar did not expressly cover the river bed and did not expressly grant any riparian rights, the law of the State of Oklahoma governs in deter-

as Exhibit "B" covers Township 23 N., Range 4 E. (Pawnee lands). These surveys were introduced in evidence at pages 85, 86, and 96 of the record. The surveys do not appear in the printed record, but photostatic copies of the surveys accompany the original record as a part thereof.

13. Record, pages 100 to 106.

14. Barney v. Keokuk, 94 U. S. 324; St. Louis v. Myers, 113 U. S. 566; Packer v. Bird, 137 U. S. 661, 673; Hardin v. Jordan, 140 U. S. 371; Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Co., 142 U. S. 254; St. Anthony Falls Water Power Plant v. Board of Water Commissioners, 168 U. S. 349; Hardin v. Shedd, 190 U. S. 508; Wear v. Kansas, 245 U. S. 154; Oklahoma v. Texas, 258 U. S. 574; Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206.

15. Oklahoma v. Texas, 258 U. S. 574; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206; In re Heff, 197 U. S. 488; General Allotment Act of 1887, 24 Stat. at L. 388, Sec. 6.

ining what riparian rights, if any, shall attach to the tents in this case.

(3) This court has many times held, as a logical consequence of the above stated rule, that in determining the parian rights of private claimants the state law governs determining *what rivers are navigable,*[16] and that what a navigable water under the laws of the states, may be in ntra-distinction to the navigable waters of the United ates.[17] This court further held in this connection that nce a state may exclude riparian owners from ownership the beds of non-navigable streams by "expressly denying riparian title,"[18] the state may do the same thing by the pedient of declaring such streams to be navigable in law, en though they "are not actually so."[19]

The petitioners recognize that there is an *important xception* to this general rule, to-wit, that the states may ot invoke a rule of navigability, contrary to the fact, gainst the United States itself or against grantees of e United States whose rights to the river bed have beome vested by *express* grants of the United States.[20] Howver, this exception does not apply to the case at bar beause in this case, *the United States is not claiming title the river bed in its sovereign capacity and has not exressly conveyed the river bed or any riparian rights thereto the claimants in the present action.*

(4) This court applied the above stated principles in

. Packer v. Bird, 137 U. S. 661; Hardin v. Jordan, 140 U. S. 371; Donnelly v. United States, 228 U. S. 243; Wear v. Kansas, 245 U. S. 154.

. Daniel Ball v. United States, 10 Wall. 557; Donnelly v. United States, 228 U. S. 259-262.

. Brewer-Elliott Oil & Gas Company v. United States, 260 U. S. 77.

. Ibid.

. United States v. Oregon, 295 U. S. 2; Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77; Oklahoma v. Texas, 258 U. S. 574.

Wear v. *Kansas*, 245 U. S. 154, in which case the Supreme Court of Kansas had taken judicial notice of the navigability of the *Kansas* River under circumstances identical with those in the case at bar.[21] In that case, as here, the river will not sustain navigation, as has been conceded by the Supreme Court of Kansas.[22] In that case, as here, a Federal patent had been granted to an Indian, prior to statehood. In that case, as here, the territorial legislature had adopted the common law which, if effective, would have extended the title of the patentee to the center of the stream at the time the patent was issued. In that case, furthermore, the Kansas territorial legislature had actually declared the Kansas River to be nonnavigable. In spite of the foregoing, the Supreme Court of the United States held that the law of the State of Kansas, and not the territorial law, governed the ownership of the river bed, and upheld the state's title thereto.

The Supreme Court of Kansas in 1912 also took judicial notice of the navigability of the *Arkansas* River,[23] which is the same river as involved in the present action. Ever since its assertion of title as above stated the State of Kansas has exercised complete ownership and dominion over the Arkansas River bed. The state has issued many oil and gas leases covering the bed of this river, similar to the leases which are involved in the case at bar. Many producing wells have been drilled in the river bed in that state and the state has been collecting royalties derived therefrom, since the date of the first production years ago, without any protest from the United States or the riparian owners.[24]

21. State v. Akers, 92 Kan. 169.
22. Hurst v. Dana, 86 Kan. 947.
23. Hurst v. Dana, 86 Kan. 947.
24. Findings of Fact No. XI, Record, p. 62; for evidence, see Record, pp. 139, 49-56.

On the authority of *Wear* v. *Kansas, supra,* the Circuit Court of Appeals for the 10th Circuit, in *Shore* v. *Shell Petroleum Corporation,* 60 F. (2d) 1, upheld the right of the State of Kansas to thus assert title to the bed of the Arkansas River. Certiorari was denied, November 7, 1932, 287 U. S. 656.

The procedure adopted by the State of Kansas to successfully assert title to the bed of the Arkansas River was identical with the procedure employed by the State of Oklahoma in *State* v. *Nolegs.*[25]

It is certain, that the Arkansas River is the same river in both Kansas and Oklahoma (except that it is nearer its source in Kansas and is, therefore, smaller and less navigable) and it is also certain that the two states belong to the same Union and that their powers are absolutely equal under the same Constitution. To the people of Oklahoma it seems unthinkable that under these circumstances the ownership of the bed of this river could be confirmed in one state while denied to the other.

The Present Action.

The State of Oklahoma in pursuance of its claim of title, sold and delivered two oil and gas leases upon the portion of the Arkansas River bed here in controversy to the Champlin Refining Company on July 20, 1942, reserving the usual royalty in favor of the state.[26] The state's lessee has drilled two producing oil wells upon one of these leases,[27] which lease is now estimated by the state to have a value of $500,000.00.[28]

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25. 40 Okl. 479.

26. Exhibits "A" and "B" to Complaint, Record, pp. 13 and 19; admitted by answers, Record, pp. 21, 25.

27. Record, p. 62. At the time of the trial only one well had been completed on the lease.

28. A photograph of the main channel of the Arkansas River at the loca-

The title of the state and its lessee is being disputed in this action by certain Otoe and Pawnee Indians who prior to Oklahoma statehood, received Federal patents covering lands along the shore adjacent to the above described river bed leases. The present action was brought in the United States District Court for the Northern District of Oklahoma by the United States on behalf of the Indians above described, to quiet their alleged title, to eject the State of Oklahoma from possession of the river bed and to cancel the above described leases. The plaintiff's case is founded upon the contention that the common law, as adopted by the Territory of Oklahoma, had the effect of extending their patents to the center of the stream at the time the patents were issued.

The complaint shows that the United States is not asserting title to the river bed in its sovereign capacity, having

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tion in controversy together with the Champlin river bed well is reproduced opposite this page as Exhibit "C" of this brief.

By stipulation at page 46 of the Record, the parties agreed that a photograph of said well and of that portion of the Arkansas River in which it was drilled, taken on June 17, 1944, from a location on the south bank of the Arkansas River approximately 500 feet east of the said well, might be introduced in evidence. The photograph here reproduced as Exhibit "C" is a photograph of said well taken in conformity with the provisions of said stipulation and intended to be introduced in conformity therewith. However, by inadvertence, a different photograph of said well taken from an entirely different direction which does not show the main channel of the Arkansas River, was attached to the stipulation and such substitute photograph appears in the record at page 48a thereof. The water in the foreground of the inadvertently substituted photograph as it appears in the record is not the main channel of the Arkansas River, but is the small channel which runs around Turkey Island on the south side. The location of the well with reference to the main channel of the Arkansas River and of the small channel around Turkey Island is shown on plaintiffs' Exhibit "B," Record, p. 32a.

The state believes that it is essential to a clear portrayal of the location of the well in question, that a print of the photograph taken in conformity with the terms of the stipulation should be produced in the brief for the information of the Court.

Exhibit "C"

to the contrary elected to claim title for the Indian riparian owners as above stated.[29]

Upon trial of the case, the state announced that it would not introduce any evidence upon the question of navigability since it was the theory of the state that the Oklahoma rule of navigability had been settled by the decision in *State* v. *Nolegs*.[30] A stipulation (R., p. 45) was thereupon entered into to the effect that it would be construed that the plaintiffs had introduced evidence that the river was navigable in fact, and that the defendants had introduced no evidence as to navigability, and further that the defendants had objected to the introduction of evidence by the plaintiff on the issue of navigability, on the grounds that the law of the state, as expressed in *State* v. *Nolegs* was controlling on that issue.

After the trial, the United States District Court rendered judgment for the state, holding that the state law governed the riparian rights of the owners of the shore lands. The trial court found that the present action was indistinguishable from *Wear* v. *Kansas*[31] and relied chiefly upon the authority of that case in rendering its decision.[32]

The Decision of the Circuit Court of Appeals.

The United States Circuit Court of Appeals for the Tenth Circuit declined to apply the state law and reversed the judgment of the trial court on the sole ground that the common law, as adopted by the Territory of Oklahoma, had

29. Complaint, Record, pp. 10, 11 and 12; Conclusions of Law, Record, p. 64.

During the course of the proceedings, a stipulation (Record, p. 34) was entered into by all parties to the effect that the decision in the present case shall not be construed as res judicata against the United States, if the United States might wish at any future time to assert title to the river bed in its sovereign capacity.

30. 40 Okl. 479.

31. 245 U. S. 154.

32. Record, p. 62.

the effect of extending the patents to the center of the stream at the time of their issuance.[33]

That court attempted to distinguish the case at bar from *Wear* v. *Kansas* on two grounds: (1) that in *Wear* v. *Kansas* the state court had taken judicial notice of the fact that the river was navigable, whereas in the case at bar the trial court found that the Arkansas river was non-navigable in fact (although the trial court further found that it was bound by the state rule of property that the river was navigable in law); and (2) that the state rule of navigability was not binding upon the Indian allottees in the case at bar because it was promulgated in a case in which they were not parties.

The Circuit Court of Appeals failed to notice one of the principal contentions of the State of Oklahoma as set forth in the pleadings[34] and as proved by the evidence[35] to-wit: That the undeniable fact remains that the State of Kansas possesses ownership and control of the bed of the Arkansas River, and that to deny the State of Oklahoma the same privilege, under identical circumstances, would violate the constitutional doctrine of equality of states.

The Circuit Court of Appeals also failed to notice or distinguish its former decision in *Shore* v. *Shell Petroleum Company*, 60 F. (2d) 1, *certiorari* denied, 287 U. S. 656, in which it upheld the title of the State of Kansas to the Arkansas River bed.

It is the earnest contention of the State of Oklahoma that this obvious discrimination between two sovereign

33. Record, p. 149.
34. Record, pp. 27, 28.
35. Record, pp. 139, 49-56; Findings of Fact XI, Record, p. 62.

states of the Union was brought about by the failure of the Circuit Court of Appeals to follow the holdings of the Supreme Court of the United States in *Wear* v. *Kansas*[36] and *Erie Railway Company* v. *Tompkins*.[37]

The Circuit Court of Appeals said that the law of the Territory governed the disposition of riparian rights, but the Supreme Court of the United States in *Wear* v. *Kansas* rejected an identical contention and held that the state law governed such rights.

The Circuit Court of Appeals, in effect, held that the question of navigability was to be determined anew upon the trial of each case that might arise concerning the ownership of the river bed, but the Supreme Court of the United States said in *Wear* v. *Kansas* that the fact of navigability "is of a kind that should be established once for all, not perpetually retried."

The Circuit Court of Appeals said that it was not bound by the rule of property promulgated by the Supreme Court of Oklahoma in *State* v. *Nolegs*[38] because the riparian owners in the case at bar were not parties to that case. To the contrary, the Supreme Court of the United States has held that where the question is one of state law, the Federal court must render the same judgment which the state court would have rendered if it were deciding the case.[39]

The Circuit Court of Appeals relied upon the finding of the trial court that the Arkansas River was not navigable in fact at the location in controversy. But, since the Supreme Court of the United States has held that the state

36. 245 U. S. 154.
37. 304 U. S. 64.
38. 40 Okl. 479.
39. Wichita Royalty Co. v. United States, 306 U. S. 106.

law of navigability governs in such cases, it would seem too plain for refutation that if the state law governs, it cannot be changed by a finding of a Federal District Court, for if it could be thus changed it would cease to be the state law.

The decision of the Circuit Court of Appeals in the present case would, if allowed to stand, result in the utmost confusion as to riparian titles along the Arkansas River in both Oklahoma and Kansas and along similar rivers in other states. In Oklahoma, where certain portions of the Arkansas River bed were expressly conveyed by the United States to Indian tribes prior to statehood, a simple rule of property has prevailed, to-wit, that those portions of the river bed which were thus conveyed to Indian tribes remain the property of the grantees, whereas all other portions of the river bed are the property of the state. In Kansas, where no such conveyance of the river bed to Indian tribes occurred, the state has held undisputed title to the entire bed for many years. In both states, the decision of the Circuit Court of Appeals would upset the established title of the state and would cause every riparian owner along the banks of the river to sue the state to recover title to the bed, and for an accounting for all royalties received by the state. Those riparian owners who came within the jurisdiction of a Federal court and who could obtain a finding by such court that the river was nonnavigable in fact, would recover title to the portion of the bed opposite their riparian lots. On the other hand, those riparian owners whose cases remained in the state courts would doubtless be met by the state rule of navigability in law, in which event the state would retain title to the portions of the river bed involved in those cases. The confusion of titles which would thus result springs from the fact that the Circuit

Court of Appeals has not followed the doctrine of the United States Supreme Court in *Wear* v. *Kansas,* in which it said:

> "In this aspect it (the navigability of a river)[40] is a question of state law. * * * The fact is of a kind that should be established once for all, not perpetually retried."

The Cases in the State Supreme Court.

Companion cases to the case at bar are now before the Supreme Court of Oklahoma, which bring into sharp relief the confusion which would result if the decision of the Circuit Court of Appeals be allowed to stand.[41] Those cases are identical with the present action in all respects, excepting only that they involve different riparian lots, owned by non-Indians which adjoin different segments of the lease in question. The District Court of Pawnee County, Oklahoma, decided those cases in favor of the state, and made no finding that the Arkansas River is nonnavigable in fact, at the location in controversy. On the contrary, the state court rejected a request by the riparian owners for such a finding, and found instead that the river was navigable under the rule of property announced by the Oklahoma Supreme Court in *State* v. *Nolegs.*[42]

The narrow grounds upon which the Circuit Court of Appeals declined to follow *Wear* v. *Kansas,* therefore do not exist in the cases in the state court, and it is apparent that even the rule announced by the Circuit Court of Ap-

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40. Language in parentheses supplied.

41. Aladdin Petroleum Corporation v. State of Oklahoma, No. 32625; L. D. Oldham v. State of Oklahoma, No. 32629.

42. Record, Supreme Court of Oklahoma, Aladdin Petr. Corp., et al., v. State of Oklahoma, et al., No. 32625, pp. 225, 245, 246; L. D. Oldham, et al., v. State of Oklahoma, et al., No. 32629, pp. 246, 266, 267.

peals would require a decision for the state in those cases. If the Supreme Court of Oklahoma decides those cases in favor of the state, the state will retain title to the segments of the river bed involved in those cases, whereas under the decision of the Circuit Court of Appeals, the segments of the river bed involved in the present action would belong to the riparian owners. Thus in future litigation the title to the bed would depend upon whether the Federal jurisdiction or the state jurisdiction were invoked, which would be the exact reverse of the result which it was the intention of *Erie* v. *Tompkins* to accomplish.

Specifications of Error.

(*1*) The court erred in holding that the common law as adopted by the Territory of Oklahoma had the effect of extending the patents of the Indian allottees in this case, to the center of the Arkansas River at the time the patents were issued.

(*2*) The court erred in holding that the Oklahoma law of navigability does not govern the riparian rights of the Indian allottees in this case.

(*3*) The court erred in holding that the riparian rights of the Indian allottees in this case are governed by the finding of the trial court that the Arkansas River is nonnavigable in fact.

(*4*) The court erred in holding that the Indian allottees for whom this suit was brought, are the owners of the south half of the Arkansas River at the location in controversy.

(*5*) The court erred in holding that the State of Oklahoma has no title to the above described portion of the Arkansas river bed.

(*6*) The court erred in reversing the judgment rendered by the United States District Court for the Northern District of Oklahoma in this case.

ARGUMENT.

PROPOSITION 1.

The portion of the Arkansas River bed here in suit was not conveyed to the owners of the shore lands by either the United States or the State of Oklahoma. On the contrary such portion of the river bed was a part of the public domain at the time the patents involved in this action were issued, and remained a part of the public domain at the time Oklahoma was admitted to statehood.

To prove this proposition it will be necessary to trace the title of the Arkansas River bed from its first acquisition by the United States from the French Nation as a part of the territory included in the Louisiana Purchase.

Original grant of Cherokee Outlet to Cherokee tribe.

In 1828, 1833 and 1835, the United States made treaties with the Cherokee Nation by which it agreed to convey to that tribe a large amount of territory covering what is now the northeastern part of Oklahoma, together with an outlet to the hunting grounds of the Great Plains, which strip covers the entire northern part of Oklahoma and is commonly known as the Cherokee Outlet.[1] This territory included the Arkansas River at the location in suit and was formally deeded to the Cherokee Nation in December, 1838, in pursuance of the above described treaties.[2] This conveyance was made to the Cherokees at a time when it was not contemplated that a state would be formed in the Cherokee Nation.[3]

It having become apparent that the Cherokees had

1. 7 Stats. 311, 7 Stats. 414, and 7 Stats. 478.
2. Def. Ex. 1C, Record, p. 118; introduced, Record, p. 96.
3. See Treaty of 1828 with the Cherokees, 7 Stats. 311.

been granted more land than they would require, a treaty was made in 1866 between the United States and the Cherokee Nation by which it was agreed that the United States might settle any tribe of friendly Indians upon lands within the Cherokee country, west of the ninety-sixth meridian.[4] As this meridian is the eastern boundary of the Cherokee Outlet, the effect of the treaty was that friendly tribes might be settled anywhere in the Outlet.

Grants of lands in the Cherokee Outlet from the Cherokee tribe to the Osages, Pawnees and Otoes.[5]

Pursuant to the above treaty, Congress by Act of June 5, 1872,[6] authorized the Cherokee Nation to convey to the Osage tribe that portion of the Cherokee Outlet which now comprises Osage County, Oklahoma. This act described the tract conveyed as follows:

> "Bounded on the east by the 97th Meridian, on the south and west by the north line of the Creek country and the *main channel of the Arkansas river*,[7] and on the north by the south line of the State of Kansas."

It was held in *Brewer-Elliott Oil and Gas Company* v. *United States*,[8] that this act, by its express terms extended the conveyance to the center of the river and thus conveyed the north half of the river bed to the Osage tribe.

In September, 1872, the Federal Government's survey of the lands here in question was approved by the Commissioners of the General Land Office and was filed by them as the official government survey of such territory. Copies

4. 14 Stats. 799.
5. For the convenience of the court we have reproduced opposite this page as Exhibit "D" hereof a map of Oklahoma showing the various grants to Indian tribes within and adjoining the Cherokee Outlet.
6. 17 Stats. 228.
7. Emphasis will be ours in all quotations unless otherwise noted.
8. 260 U. S. 77.

of the portions of this survey pertaining to the townships which include the river lots here in suit, to-wit, Township 23 North, Range 3 East, (Otoe lands) and Township 23 North, Range 4 East (Pawnee lands) were introduced in evidence[9] and photostatic copies thereof accompany the printed record as a part thereof. Reproductions of these plats are shown in the appendix of this brief as Exhibits "A" and "B," respectively. These plats show that the bed of the Arkansas River was not surveyed and was not included within any township, section or lot lines, but was meandered as in the case of all rivers in which title to the bed was reserved to the public. None of the government lots along the bank of the river included any portion of the river bed.

It it worthy of note that the Federal government never attempted to sell or convey any portion of the river bed to any Indian tribes after the filing of this survey, having apparently decided that a state would eventually be formed in the Indian territory, and that the remaining portions of the river bed should be reserved to the public as in the older states.

Thereafter, in 1876, Congress set apart a portion of the Cherokee Outlet, together with a small portion of the Creek territory, as a reservation for the Pawnee tribe which reservation is a part of the present Pawnee County of the State of Oklahoma.[10] This reservation included Township 23 North of Range 4 East, which is one of the townships in suit. It is important to note that the description of such reservation in the Act of Congress above referred to reads as follows:

"All that tract of country *between* the Cimarron

9. Record, pp. 85, 86, and 96.
10. 19 Stats. 28.

and Arkansas Rivers embraced within the limits of Townships 21, 22, 23, 24 N., Range 4 E. * * *."

The use of the word "between" clearly indicates that neither the Arkansas River nor the Cimarron River was included within the reservation. Furthermore, the government survey above referred to did not include any portion of the river bed within Township 23 of Range 4, but on the contrary stopped the township lines at the river's edge.

On March 3, 1881, Congress authorized the Secretary of the Interior to move the Otoe and Missouria tribes from their then reservations in Kansas and Nebraska,[11] and on June 25, of that year the Secretary of the Interior issued an order setting apart a reservation of 129,113.20 acres for the Otoe and Missourias out of the Cherokee Outlet, which reservation is located in what is now Pawnee County, Oklahoma. Unlike the grant to the Osages, the Otoe reservation did not include any portion of the Arkansas River bed. On the contrary, this reservation included only that portion of the territory which lay on the river bank, as shown by the express language of the Secretary of the Interior's order. As the order is short, we quote it in full, omitting only the townships not involved in this action:

"Department of the Interior,
Washington, June 25, 1881.

"Sir: Agreeably to your recommendation of the 13th instant, the following described lands in the Indian Territory, west of the 96°, west longitude, in the tract ceded to the United States by the Cherokees, for the settlement of friendly Indians, by the sixteenth article of their treaty of July 19, 1866, are hereby designated and assigned for the use and occupation of the confederated Otoe and Missouria tribes of Indians, under

11. 21 Stats. 380.

the provisions of the Act of Congress approved March 3, 1881, (21 Stat., p. 381) namely • • •

"Also that portion of Township 23 North, Range 3 East, lying west of the Arkansas River, containing 14,098.84 acres.

"Total acreage, 129,113.20 acres.

"The papers which accompanied your letter before noted are herewith returned.

Very respectfully,

S. J. Kirkwood, Secretary,
The Commissioner of Indian Affairs."[12]

It is to be noted that this order used the words, "lying west of the Arkansas River," indicating the clear intention of the Federal Government that the bed of the Arkansas River should not be included in the Otoe reservation.

It is to be further noted that the portion of the said township which was set apart for the Otoes was stated in the order to contain 14,098.84 acres. The present county surveyor of Pawnee County has carefully computed the acreage shown on the government survey, using the acreage figures as shown thereon for each lot, section and fractional section contained in the said fractional Township 23 N. of Range 3 E., and has certified that the acreage of the said fractional township, as shown on the government plat, exclusive of the river bed, is 14,099.24 acres.[13] This certificate was corroborated by a similar certificate of Roy G. Collier, civil engineer.[14]

The acreage as shown by these certificates is only 4/10 of an acre different than the acreage as shown in the secretary's order. This difference is so slight as to be entirely

12. Plf. Ex. 5, Record, pp. 106-107; introduced, Record, pp. 77, 96.
13. Def. Ex. 9A, Record, p. 134; introduced, Record, p. 96.
14. Def. Ex. 9, Record, p. 128; introduced, Record, pp. 86, 96.

negligible, particularly in consideration of the intricacy of the computation, as shown by the work sheets attached to the affidavits. (Record, pp. 106, 134) The fact is evident, therefore, that the Federal Government, by order of the Secretary of the Interior set aside a stated number of acres in the said township as a reservation for the Otoes, and the official government survey shows that this stated number of acres comprises only that part of the said township which lies west of the river, *exclusive of the river bed.*

In 1883 Congress made an appropriation for the purchase from the Cherokees of these new reservations for the Pawnees, Otoes, Missourias, and the other Indian tribes which were settled in the Cherokee country. This Act of Congress[15] provides as follows:

> "That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the Treasury of the Cherokee Nation, out of the funds due under appraisement for Cherokee lands *west of the Arkansas River,* which sum shall be expended as the acts of the Cherokee legislature direct, this amount to be immediately available; Provided, that the Cherokee Nation through its proper authorities shall execute conveyances, satisfactory to the Secretary of the Interior, to the United States, in trust only for the benefit of the Pawnees, Poncas, Nez Percés, Otoes and Missourias and Osages now occuyping said tract, *as they respectively occupy the same* before the payment of said sum of money."

It is important to note that this act uses the words "west of the Arkansas River," again clearly indicating the recognition by Congress that the lands of the Otoes and Missourias did not include the bed of the river.

It will also be noted that the statute states that the

15. 22 Stats. 624.

land granted to the Otoes shall be "as they respectively occupy the same." Previous to the enactment of the statute, the Secretary of the Interior had set apart the Otoe Reservation on the west bank of the river and had defined this reservation by number of acres, as above stated, showing clearly that no part of the reservation was in the bed of the Arkansas River. It is clear, therefore, that at the time of the enactment of the Federal statute, the land occupied by the Otoes was the reservation as defined by the Secretary of the Interior, and that the Federal statute, by stating that the grant shall be limited to the land "now occupied" by the Otoes, confirmed the intention that the grant should cover only the reservation on the west shore of the river.

Pursuant to the above described statutes and orders, the Cherokees executed formal conveyances on June 14, 1883, one of which was made to the United States in trust for the Otoes and Missourias[16] and the other to the United States in the trust for the Pawnees.[17] These deeds were drawn in almost identical language, each with the other, with the exception only of the property conveyed. They both recite that they are made in pursuance of the Act of Congress of 1883 above referred to,[18] by which, in the language of the deeds, "$300,000 was appropriated 'to be paid into the Treasury of the Cherokee Nation out of funds due unto appraisement for Cherokee lands *west of the Arkansas River*'."

The deed to the Pawnees then recite that it conveys:

"The following townships and fractional townships north and east of the Indian meridian, the

16. Plf. Ex. 7, Record, p. 111; introduced, Record, pp. 77, 96.
17. Plf. Ex. 6, Record, p. 107; introduced, Record, pp. 77, 96.
18. 22 Stats. 624.

fractional townships *being on the right bank of the river* * * * fractional Townships 23 and 24 North, Range 4 East. * * *"

The deed to the Otoes, in similar language, recites that it conveys:

"All those certain tracts of land lying and being in the Indian Territory embracing the following township and fractional township north and east of the Indian meridian, *viz.*, * * * fractional Township 23 N., Range 3 E., of the Indian meridian, *lying and being on the right bank of the Arkansas river.* * * *"*

The Otoe deed then goes on to recite that the entire reservation covered by the deed contains, in all 129,113.20 acres, which is exactly the same acreage as stated in the order of Secretary of the Interior above referred to.

Each deed refers to an annexed plat marked "A."[19] Each of these plats expressly shows that the Arkansas River is excluded from the territory covered by the deed and that the township lines stop at the edge of the river.

It is apparent from the foregoing statutes, orders and conveyances that neither the Pawnee nor Otoe tribes received title to any portion of the Arkansas River bed but that the bed in its entirety remained the property of the Cherokee Nation, excepting only that portion which had been expressly conveyed to the Osages.

We believe it clear that the language of the statutes, orders and conveyances support the above conclusions, but as further authority we respectfully cite the following:

(*1*) The grants to the Pawnees and the Otoes were made to those tribes as individuals and not as sovereign

19. Plf. Exs. 6 and 7; photolithograph copies of these plats appear in the Record at pp. 110a, 114a; introduced, Record, pp. 77, 96.

nations, since Congress, by the Act of March 3, 1871, (16 Stats. 566) provided, "that hereafter no Indian tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." (See preface of second edition of Kappler's Indian Laws and Treaties, Vol. 1.) The grants to the Otoes and Pawnees were made long after the above quoted Act of Congress, and hence were made to those Indians in the same manner and with the same effect as though the grants had been made to any other organization or private individuals.

(*2*) In *Barney* v. *Keokuk*, 94 U. S. 324, this court considered a grant to the half-breed Sac and Fox tribe covering lands on the shores of the Mississippi and Des Moines Rivers. This grant was strikingly similar to the grants in the present action, to the Pawnees and Otoes. In fact, the same word, "between" was used in both grants. The grant to the Pawnees was to the lands lying "*between*" the Cimarron and Arkansas Rivers,[20] and the grant to the half-breed Sac and Fox tribe covered lands lying "*between*" the Mississippi and Des Moines Rivers.

This court held, in *Barney* v. *Keokuk*, that the grant to the half-breed Sac and Fox Indians was to them as persons and not as a political body, that the riparian rights attaching to their grants were to be construed according to the law of the state and that according to the law of the State of Iowa, the grant did not include the river beds but stopped at the banks of the Mississippi and Des Moines Rivers. The court said:

"The peculiar origin of the title to the 'Half-breed Sac and Fox Reservations,' in the peninsula lying be-

20. 19 Stats. 28.

tween the Rivers Mississippi and Des Moines, *did not take it out of the general rule.* This was so held in the case of *Haight* v. *Keokuk,* cited above. (4 Iowa 199). That case was nearly identical with the present as respects the claim of the adjoining proprietor to the title of the land in Water Street and on the river bank. Haight contested the right of the city to control the wharf along said street, claiming, by virtue of his fee simple title, the right to erect a private wharf and to receive the emoluments thereof. His claim was overruled, and on the question of title the court said:

> 'According to the case of *McManus* v. *Carmichael,* then, Haight owns the soil to high water only. But here is interposed the argument, that this land is not held under the United States by the usual manner of grants, that is, by patent, after a survey, and described by section, town and range. This is true; but yet it will not affect the extent of the complainant's right. *The grant to the half-breeds was to them as persons and not as a political body.* The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary *between nations or states,* and then the line would have been the medium *filum aquae,* as it is now between Iowa and Illinois. * * * *The grant was to them as individuals, as tenants in common, and is to be construed as any other grant or sale to individuals'.*"

(*3*) The Supreme Court of the United States, in *Brewer-Elliott Oil and Gas* v. *United States,* 260 U. S. 71, affirmed the contention which we now make when it considered the language of the deed from the Cherokees to the Osages.

In its opinion in the above entitled case, the court first traced the title of the Osages and observed that the Con-

gressional Act of 1872 provided that the territory conveyed to the Osages shall be bounded by "the main channel of the Arkansas River," meaning the center of the stream. The court called attention to the fact that the deed which was later, in 1883, executed and delivered by the Cherokees to the Osages did not follow the description contained in the Act. Instead of describing the territory as bounded by the main channel of the Arkansas River, it described the tract by townships and fractional townships, "the fractional townships being on the left bank of the Arkansas River." This is almost exactly the same language as was contained in the deeds from the Cherokees to the Pawnees and Otoes in the present case (made the same date as the deed to the Osages). The court went on to say, however, that the title of the Osages was to be determined *not by the deed,* but by the Act of Congress, and since the Act carried the title to the center of the stream, the Act should govern in spite of the conflicting provisions in the deed. The language of the court is as follows:

> "We have no doubt that the title to the river bed is to be determined by the language of the Act of June 5, 1872, and that the meaning of the Cherokee deed is to be interpreted, *not as if its words stood alone,* but in the light of the Acts of Congress in pursuance of which it is made, and especially of the Act of 1872, under which the Osages took possession, and which was enough to vest in them good title to the land described therein *without the deed* of 1883."

The deed, therefore, was interpreted "not as if its words stood alone," but in a different or opposite manner than if its words stood alone, simply because the Act of Congress expressed a different intention. This is as strong an implication as the court could make (short of an express

holding, which was entirely unnecessary to the decision in that case) to the effect that the language of the deed would not have conveyed the river bed. We could ask no stronger affirmation of our contention that the deeds to the Pawnees and Otoes in the present case did not convey the river bed to that tribe, for in our case the Act of Congress, the order of the Secretary of Interior, and the deed all excluded the river bed from the conveyances.

Re-acquisition of Cherokee Outlet by United States.

Shortly after the Pawnees and Otoes were moved to their new reservations as above described, the unappropriated lands in the old Oklahoma Territory were opened for settlement, and the success of the famous run of 1889 led to a determination on the part of Congress to acquire the Cherokee Outlet for settlement in like manner. To accomplish this, Congress adopted the policy of purchasing back from the various Indian tribes the territory included in the Outlet, after which the lands in the various reservations were to be allotted to the members of the respective Indian tribes in severalty, and the remainder patented to settlers.[21]

Accordingly, the United States made a treaty with the Pawnee tribe in 1892[22] by which the Pawnees ceded their reservation to the United States, and agreed that the United States should allot the land to each individual member of the tribe in accordance with the General Allotment Act of 1887.[23] This treaty describes the territory thus ceded in exactly the same language as did the previous Act of Con-

21. Mills, Oklahoma Indian Land Laws, p. 407.
22. Kappler Indian Affairs, Laws and Treaties, Vol. 1, pp. 496-498; Def. Ex. 10, Record, p. 139 (by reference only); introduced, Record, pp. 87, 96.
23. 24 Stats. 389.

gress which had conveyed the property from the Cherokees to the Pawnees,[24] to-wit:

> "All of that tract of country *between the Cimarron and Arkansas Rivers* embraced within the limits of Townships 21, 22, 23 and 24 North of Range 4 East. * * *"

In 1893 Congress made an appropriation with which to pay the Pawnee tribe for the reservation thus ceded back to the United States. This statute[25] reads in part as follows:

> "That the sum of eighty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the same to be immediately available, to pay the Pawnee tribe of Indian Territory, for all their right, title, claim and interest of every kind and character in and to all that tract of country *between the Cimarron and Arkansas Rivers* embraced within the limits of seventeen specified townships of land, ceded, conveyed, and relinquished to the United States by said Pawnee tribes of Indians, by article one of an agreement concluded on the twenty-third day of November, eighteen hundred and ninety-two between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed commissioners on the part of the United States, and said Pawnee tribe of Indians. * * *"

The use of the word "between" again indicates the recognition by Congress that the Pawnee tribe had never owned any portion of the Arkansas River bed. It is also clear from the foregoing that the Pawnees relinquished to the United States every vestige of title which they had ever owned in any and all lands which they had acquired in Oklahoma. However, such relinquishment does not affect the title to the river bed as the Pawnees never held title thereto.

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24. 19 Stats. 28.
25. 27 Stats. 568, Sec. 12.

No treaty was made with the Otoe and Missouria tribes, their lands being allotted to the individual members of the tribe by authority of the General Allotment Act of 1887.[26] However, as the Otoes had never acquired the bed of the Arkansas River, it was not necessary that they should relinquish any title thereto.

On December 19, 1891, a treaty was made with the Cherokees by which they ceded to the United States all of their remaining right, title and interest in and to the Cherokee Outlet including the bed of the Arkansas River.[27] The all-inclusive nature of this cession is shown by the first article of the treaty which reads as follows:

> "The Cherokee Nation by act duly passed shall cede and relinquish all its title, claim, and interests of every kind and character in and to that part of the Indian Territory bounded on the west by the State of Kansas; on the east by the ninety-sixth (96°) degree of west longitude, and on the south of the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation, created or defined by Executive Order dated August 10, 1869. The tract of land embraced within the above boundaries containing eight million, one hundred and forty-four thousand, six hundred and eighty-two and ninety-one one hundredths (8,144,682.91) acres more or less."

The above description defines the Cherokee Outlet and includes the Arkansas River at the location in suit.

In 1893, Congress approved the above described treaty and made an appropriation to pay the Cherokees for the

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26. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.
27. Kappler, Indian Affairs, Laws and Treaties, Vol. 1, pp. 490-492; Def. Ex. 12, Record, p. 139 (by reference only).

territory thus ceded.[28] This Act of Congress reads in part as follows:

> "That the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars payable as hereinafter provided is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed to contract to pay eight million, three hundred thousand dollars, or so much thereof as may be necessary in addition, to pay the Cherokee Nation of Indians for all the right, title and interest and claims which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between David H. Jerome, Alfred M. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indian Territory, on the nineteenth day of December, eighteen hundred and ninety-one, bounded on the west by the one-hundredth degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree of the west longitude, and on the south by the Creek Nation, the Territory of Oklahoma and the Cheyenne and Arapahoe Reservation, created or defined by Executive order dated August tenth, eighteen hundred and sixty-nine; * * * "

The comprehensive terms of the treaty and the Act of Congress which ratified it, leave no doubt that the Cherokees relinquished to the United States all interest of every kind and character, which they may have had in the territory contained in the Cherokee Outlet. As noted above, the Cherokees had retained title to the bed of the Arkansas River throughout its entire course in the Cherokee Outlet, excepting only the portion expressly conveyed to the Osage tribe. It is clear, therefore, that by the terms of the cession

28. 27 Stats. 557, Sec. 10.

by the Cherokees above noted the entire bed of the Arkansas River in the Cherokee Outlet, excepting the portion previously conveyed to the Osage tribe, became the property of the United States as part of the public domain.

This was expressly confirmed by the Presidental Proclamation of August 18, 1893,[29] by which the Cherokee Outlet was opened for settlement.

The proclamation first recites that the Cherokee Nation had previously

> "ceded, conveyed, transferred, relinquished and surrendered all of its title, claim and interest of every kind and character * * *"

in and to the Cherokee Outlet. The proclamation then declares that all of the lands thus acquired from the Cherokees and Pawnees (together with the other lands making up the Cherokee Outlet) would be open for settlement, saving and excepting only the lands in the Osage and Otoe reservation.

The pertinent parts of the proclamation are quoted as follows:

> "Now, therefore, I, GROVER CLEVELAND, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by other laws of the United States, and by said several agreements, do hereby declare and make known that *all the lands acquired from the Cherokee Nation of Indians,* the Tonkawa tribe of Indians, *and the Pawnee tribe of Indians,* by the three several agreements aforesaid will at the hour of twelve o'clock noon (Central Standard Time) on Saturday the sixteenth day of the month of September, A. D. eighteen hundred and ninety-three, and not before, be opened to settlement under the terms

29. 28 Stats. 1222.

of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this proclamation, *saving and excepting* lands described and identified as follows, to-wit: The lands set apart for the Osage and Kansas Indians, being a tract of country bounded on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, on the south and west by the Creek country and *the main channel of the Arkansas River;* the lands set apart for the confederated Otoe and Missouria tribes of Indians, described as follows, to-wit: Township Twenty-two North, Range One East; Township Twenty-three North, Range One East; Township Twenty-two North, Range Two East; Township Twenty-three North, Range Two East; Township Twenty-two North, Range Three East; and that portion of Township Twenty-three North, Range Three East, *lying west of the Arkansas River;* * * *" (and other lands not involved in this case).

It is highly significant that the President took pains in his proclamation to state that the Osage reservation was bounded "by the main channel of the Arkansas River," and to further state that, on the contrary, the Otoe reservation was comprised of lands *"lying west of the Arkansas River."*

On this account, it is clear that the south half of the Arkansas River bed, adjoining the Otoe reservation, was declared to be a part of the public domain, because in the proclamation the Otoe reservation was declared to be confined to lands "lying west of the Arkansas River." It is equally clear that the north half of the Arkansas River bed within the Osage reservation was declared not to be a part of the public domain, because, in the proclamation, the

Osage reservation was declared to extend to "the main channel of the Arkansas River."

There is nothing unusual in the circumstance that the north half of the Arkansas River is owned by the Osage tribe under the express Federal grant and the south half of the river bed is reserved to the public. This same condition was approved by the Supreme Court of the United States as to the Red River in *Oklahoma* v. *Texas*, 258 U. S. 574. In that case, the United States had made an express grant of the north half of the Red River to the Kiowa, Commanche, and Apache tribes but no grant of the south half of the river bed had been made.

This court in *Oklahoma* v. *Texas* confirmed the title of the Kiowa, Commanche and Apache tribes to the north half of the Red River but refused to extend their title beyond the limits of their express grant. This left the south half of the Red River as a part of the public domain, and this court confirmed the title of that portion of the river bed in the United States in its sovereign capacity.

In the present case the south half of the Arkansas River has never been conveyed to any Indian tribe or any other person and hence it also has remained a part of the public domain. The only difference between the case of the Red River and that of the Arkansas is that in the former case, the United States elected to retain title to the south half of the river bed, whereas in the case of the Arkansas River, the United States has not elected to assert title, thus permitting the south half of the Arkansas River bed to pass to the State of Oklahoma as trustee for the public.

Allotment of Pawnee and Otoe lands.

After the Cherokee Outlet had been opened for settlement, the Federal Government proceeded to distribute the lands in the Pawnee and Otoe reservations to the members of those tribes in severalty under authority of the General Allotment Act of 1887.[30]

Accordingly, the Government issued the trust patents which are involved in the case at bar as follows:

PAWNEES.

Patent dated October 9, 1893, to William Bayhylle, covering Lot 6, of Section 17, Township 23 North, Range 4 East (together with other lands);[31]

Patent dated October 9, 1893, to Horace Field, covering Lots 1, 2, and 3 of Section 19, Township 23 North, Range 4 East (together with other lands);[32]

OTOES.

Patent dated November 24, 1906, to Ethel Lewis Barnes, covering Lots 5, of Section 24, Township 23 North, Range 3 East (together with other lands);[33]

Patent dated June 10, 1907, to Anna Robedeaux, covering Lot 6 of Section 24, Township 23 North, Range 3 East (together with other lands).[34]

All of the above patents described the lands by lot numbers, and a reference to the official Government survey[35]

30. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.
31. Plf. Ex. A, Record, p. 100; introduced, Record, pp. 75, 96.
32. Plf. Ex. 2, Record, p. 102; introduced, Record, pp. 75, 96.
33. Plf. Ex. 3, Record, p. 103; introduced, Record, pp. 75, 96.
34. Plf. Ex. 4, Record, p. 105; introduced, Record, pp. 75, 96.
35. See Exhibits "A" and "B" in the appendix to this brief. Def. Exs. 7 and 8; introduced, Record, pp. 85, 86, 96. (Photostatic copies of these plats accompany printed Record as a part thereof.)

shows that the said lots were confined to the bank of the river and did not cover or include any portion of the bed.

PROPOSITION 2.

Since the Federal patents in the case at bar did not expressly convey the river bed and did not expressly grant any riparian rights, the law of the State of Oklahoma governs in determining whether or not the title of the riparian owners extends to the center of the Arkansas river.

(1) ***The state law determines the extent of the riparian rights, which attach as an incident to Federal patents in all cases in which the patent does not define such rights.***

This rule has been upheld in a long line of decisions of the Supreme Court of the United States, from which we quote:

Brewer-Elliott Oil and Gas Company v. *United States,* 260 U. S. 89:

> "In Government patents containing no words showing purpose to define riparian rights the intention to abide the state law is inferred."

Hardin v. *Jordan,* 140 U. S. 402:

> "In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.
>
> • • • • • • • •
>
> "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question of how far the title of a riparian owner extends is one of local law. For a determination of that question the *statutes of the state and the decisions of its highest court furnish the best and the final authority.*"

Kaukauna Water Power Co. v. *Green Bay & Miss. Canal Co.*, 142 U. S. 271:

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. * * * *With respect to such rights we have held that the law of the state as declared by its Supreme Court, is controlling as a rule of property.*"

Shively v. *Bowlby*, 152 U. S. 57:

"By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case."

St. Anthony Falls Water Power Company v. *Board of Water Commissioners*, 168 U. S. 366:

"The jurisdiction of the state over this question of riparian ownership has been always, and from the foundation of the Government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review:"

"* * * it does not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts."

Rundel v. *Delaware and Raritan Canal Co.*, 55 U. S. 80:

"It is evident, that the extent of the plaintiff's rights as a riparian owner * * * must depend on the laws and customs of Pennsylvania, as expounded by her own courts."

(2) *The above stated rule applies to non-navigable streams as well as to navigable streams.*

Hardin v. *Shedd*, 190 U. S. 519:

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. Nevertheless, it has become established almost without argument *that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies.*"

(3) *The same rule applies to Federal patents to Indians and Indian tribes.*

Oklahoma v. *Texas*, 258 U. S. 594:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance

should be construed and given effect in this particular according to the law of the state in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*"

The above language was quoted with approval in *Brewer-Elliott Oil and Gas Co.* v. *United States*, 260 U. S. 77.

This court has affirmed this rule in the very recent case of *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 209-210, in which it was held that the rights of the public to a highway easement on the lands of Indian allottees adjoining a state highway are to be determined by the laws of Oklahoma, and said;

> "It is well settled that a conveyance by the United States of land which it owns beneficially, or, as in this case, for the purpose of exercising its guardianship over Indians, *is to be construed, in the absence of any contrary indication of intention, according to the law of the state where the land lies.*"

Supporting this conclusion the court said further at p. 211:

> "The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the state, and then only by permission of the Secretary, subject to compliance with 'such requirements as he may deem necessary.'
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear."

These words are significantly applicable to the case at bar, for in the present case the State of Oklahoma is subjecting the Indians "only to the same rule of law as are others in the state." Furthermore, the shore of the Arkansas River is "spotted with restricted lands held in trust for Indian allottees" and "complication and confusion would follow from applying to * * * such lands rules differing from those which obtain as to lands of non-Indians."

The rule announced in the above quoted cases finds support in the General Allotment Act of 1887, under which the Pawnee and Otoe lands involved in the case at bar were distributed. This statute reads in part as follows:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of *and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.*" (24 Stats. 389, Section 6.)

The Supreme Court in *Re Heff*, 197 U. S. 503, declared that under such act the Indians became subject to the state laws immediately upon issuance of the trust patent. The court said:

> "So far as his political statute is concerned, the allottee is declared to be a citizen— not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued."

PROPOSITION 3.

The adoption by the Supreme Court of Oklahoma of the rule of property that the Arkansas River is navigable had the effect of excluding the riparian owners from ownership of the bed and vested title in the State.

(1) ***The state law governs in determining what shall be deemed a navigable water within the meaning of the local rules of property.***

Donnelly v. *United States*, 228 U. S. 262:

"But it results from the principles already referred to that *what shall be deemed a navigable water within the meaning of the local rules of property* is for the determination of the several states."

Hardin v. *Jordan*, 140 U. S. 382:

"This right of the states to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes which are treated as inland sea; and also, in some states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state *to what waters* and to what extent this prerogative of the state over the lands under waters shall be exercised."

Packer v. *Bird*, 137 U. S. 669:

"* * * In this case *we accept the view of the Supreme Court of California* in its opinion as expressing the law of that state, *'that the Sacramento River being navigable in fact,* the title of the plaintiff extends no farther than the edge of the stream'."

United States v. *Holt State Bank*, (C. C. A. 8) 294 Fed. 165:

"Moreover, since the settled law has become that

the rights and interests of riparian owners on the shores of lakes and rivers to the lands under the waters upon which they border are determinable by the laws of the state in which the lands lie, and since such rights and interests are often conditioned by the navigability of such waters, *it logically follows, and has long since become the law of the land, with some exceptions not material in consideration of this case* (*Brewer-Elliott Oil & Gas Co.* v. *United States,* (C. C. A.) 270 Fed. 100, 107, 109) *that in the determination of the rights of riparian owners to the lands under the water upon which their lands border, what shall be deemed a navigable water must be determined by the law of the state in which the riparian lands lie.*"

(2) *The state rule of navigability may be the opposite of the Federal rule.*

In the leading cases in which the Supreme Court of the United States laid down the Federal rule of navigability, this court recognized that the state laws of navigability might be in contradistinction to the Federal rule.

Daniel Bell v. *United States,* 10 Wall. 557:

"And they constitute navigable waters of the United States within the meaning of the Acts of Congress in *contradistinction from the navigable waters of the states,* when they form in their ordinary condition by themselves, a continuous highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water."

Donnelly v. *United States,* 228 U. S. 262:

"The question of the navigability in fact of non-tidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the

United States, within the meaning of the Act of Congress, *in contradistinction to the navigable waters of the states,* depends upon whether the stream in its ordinary condition affords a channel for useful commerce."

As an example, the Mississippi River is of course navigable under the Federal test of navigability in fact. However, in *Hardin* v. *Jordan,* 140 U. S. 371, the Supreme Court of the United States called attention to the fact that at the time of that decision the Mississippi River was not navigable under the laws of Illinois because that state held to the old English rule that a river was not navigable if not tidal.

Also, in *Escanaba Trans. Co.* v. *Chicago,* 107 U. S. 582, this court observed *"that in some states"* the old English law that no water was navigable unless affected by the tide, still governed the rights of riparian owners to the beds of streams in those states.

And in *Barney* v. *Keokuk,* 94 U. S. 224, this court commented upon the fact that the English rule of navigability had for two generations been adopted *by many states* as the doctrine upon which ownership of the soil in navigable waters was based, and then added:

"Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, *is for the several states themselves to determine.*"

In the recent case of *United States* v. *Appalachian Electric Power Company,* 311 U. S. 408, this court again recognized that navigability for the purpose of fixing the ownership of a river bed was distinct from navigability for the purpose of regulation of commerce. The court said:

"Although navigability *to fix ownership of the river bed* or riparian rights is determined as the cases just cited in the notes show, as of the formation of the

Union in the original states or the admission of statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise."

And this court, in the same opinion, recognized the control of the states for the local purpose above cited. The court said:

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers'."

(3) *Since the riparian owners in this action never received title to the river bed, they cannot maintain this suit to quiet title against the state, regardless of whether the State of Oklahoma or the United States owns the river bed.*

Authority for the above proposition is found in *Marshall Dental Mfg. Company* v. *Iowa*, 226 U. S. 460:

"By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining lake. (Citing cases.) *It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the state.*

"The question as to the title to the bed is treated as open in *Hardin* v. *Shedd*, 190 U. S. 508, 519 * * * and *Whitaker* v. *McBride*, 197 U. S. 510, 515 * * * and there is not need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake *sufficient to entitle it to maintain this suit against an intruder without title, whether the state owns the bed or not. The principle has been affirmed and acted on by the court so recently that it does not require further argument here.*"

Further authority is found in *Hardin* v. *Jordan,* 140 U. S. 371, in which the court said that in quiet title actions,

> "• • • *the plaintiff must stand or fall by his own title,* and not by reason of any defect in the title of the defendant."

Although we are firmly convinced that the present action may be decided, as were the above cited cases, wholly on the grounds that the plaintiffs have no title, we propose to show affirmatively that under the settled decisions of this court, the State of Oklahoma may exercise ownership and control of the Arkansas River bed.

(4) *Since a state may exclude riparian owners from title to the beds of nonnavigable streams by expressly denying a riparian title, the state may accomplish the same result by the expedient of declaring such streams to be navigable in law and thereby preserve title to such beds in the public.*

Brewer-Elliott Oil and Gas Company v. *United States,* 260 U. S. 77:

> "Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river *granted* and vesting before statehood, depends for its validity on nonnavigability of the stream in fact.
>
> "In *Wear* v. *Kansas,* 245 U. S. 154, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, to land bordering on the Kansas River, without restriction, reservation, or expansion. The state tribunals took judicial notice of the navigability of the riv-

er, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. *The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a nonnavigable stream, was immaterial. In either view the result there would have been the same.*"

We respectfully submit that the above quotation contains the controlling law of this case.

As an example of a situation in which, "the local law worked its purpose by expressly denying a riparian title," this court, in its opinion in the case of *Hardin* v. *Jordan*, 140 U. S. 393, recognized that certain of the original states had retained title to the beds of their public waters, regardless of navigability. The court said:

> "These ordinances seem to have been the foundation of a local common law in Massachusetts (including Maine) which has led to a course of decisions with regard to the title of lakes and ponds *at variance with the common law*, and which have been followed in New Hampshire and some other states. It is there held that the land under water in such lakes and ponds *belong to the state*, and not to the riparian owners; and that when land is conveyed bounding upon a natural lake or pond, the grant extends only to the water's edge."

It is apparent that under the doctrine of equality of states, the new states have the same right to retain the beds of their public waters as did the original states, and that, as above stated in *Brewer-Elliott Oil and Gas Company* v. *United States*, the states may do so "by conclusively determining the navigability of the stream without regard to the fact."

(5) ***Although there is an exception to this general rule, to-wit, that the states may not invoke a rule of navigability contrary to the fact, against the United States itself or against grantees of the United States whose rights to the river beds have become vested by express grants, this exception does not apply to the case at bar because in this case the United States is not claiming title to the river bed in its sovereign capacity[36] and it has not expressly conveyed the river bed or any riparian rights therein to any claimants in the present action, or otherwise.***

Examples of this exception to the general rule are found in the following cases:

In *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, this court awarded the north half of the Arkansas River to the Osage tribe because the United States had *expressly* conveyed such portion of the river bed to the Osages prior to Oklahoma statehood. The court said at page 87:

> "If the Arkansas River is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel *because the words of the grant expressly carry the title to that line.*"

The court applied the Federal rule of navigability in fact in that case because it was construing an *express* Federal grant of the river bed. However, there is no Federal grant of the river bed involved in the case at bar, nor is there any implication whatsoever of Federal intent to convey more land than was actually described in the various conveyances of the shore lands. Hence, under the decisions quoted under Proposition 1 of this brief, the state law of navigability, and not the Federal law, governs the riparian

36. Complaint, Record, pp. 10, 11, 12; Stipulation, Record, p. 34; Conclusions of Law, Record, p. 64.

rights of Indian allottees in the present case. The court recognized this general rule by stating at page 88 of the opinion in the *Brewer-Elliott* case:

> "It is true that where the United States has not in any way provided otherwise, the ordinary incident attaching to a title traced to a patent of the United States under the Public Land Laws *may be determined according to local rules.*"

In *United States* v. *Oregon*, 295 U. S. 6, the court held, that a state could not invoke a rule of navigability contrary to the fact so as to deprive the United States (in its sovereign capacity) of its superior title. The court, however, recognized that the state law is supreme in defining the riparian titles of private claimants for it said later in the opinion in that case at page 28:

> "The construction of grants by the United States is a Federal, not a state, question (citing cases), and involves the consideration of state questions only in so far *as it may be determined as a matter of Federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances* (citing cases). In construing a conveyance by the United States of land within a state, *the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.*"

The state law in this regard therefore becomes the Federal law *by the assent of the United States.*

In *Oklahoma* v. *Texas*, 258 U. S. 574, this court declined to follow the Oklahoma rule of navigability contrary to the fact, because in that case the United States had made an *express* grant of the north half of the Red River bed to Indian tribes prior to statehood, and had retained title

(in its sovereign capacity) to the south half of the river bed. However, this court again recognized the general rule that state laws govern the riparian rights of private claimants who have received no express grant to the river bed, in the following language found at page 594, which we repeat for emphasis:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, *if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies.* Where it is disposing of tribal land of Indians under its guardianship, the same rules apply."

PROPOSITION 4.

The Oklahoma rule of property that the Arkansas River is navigable and that the bed belongs to the state is clear and unequivocal and has been the settled law of this state since its promulgation shortly after Oklahoma was admitted to statehood.

The Oklahoma Supreme Court said in *State* v. *Nolegs*, 40 Okl. 479:

> "The above cases of *Dana* v. *Hurst, supra,* and *United States* v. *Mackey, supra,* both being exhaustive and well-considered opinions, the same are approved by this court, and we hold that the Arkansas River is a navigable stream in its entire course through the

State of Oklahoma, and that the title of the bed thereof, to the high-water mark, is in the state. * * *"

The Oklahoma court "had in its favor"[37] the fact that the river had been meandered in the original Federal survey and that the Arkansas River had previously been held to be navigable both in Oklahoma and Kansas in the cases noted in the above quotation.

In Oklahoma the river had been held to be navigable in *United States* v. *Mackey,* (U. S. D. C., E. D. Okla.), 214 Fed. 137, in the following language:

> "Is the Arkansas River a navigable stream so far as concerns the question of the title to the bed thereof? That it is was practically conceded at the oral argument. This question was answered in the affirmative by the Supreme Court of Kansas in the case of *Dana* v. *Hurst,* 86 Kan. 947, 122 Pac. 1041, decided last February, for reasons which appear to me to be sound, set forth in a well considered opinion. We therefore start with the proposition that the Arkansas River is a navigable stream."

In Kansas, the Arkansas River had been held navigable in *Hurst* v. *Dana,* 86 Kan. 947, in the following language:

> "But, considering the character, width and length of the river, the various acts and declarations by Congress in reference thereto and the policy shown thereby with reference to waters which more than 100 years ago were navigable according to the needs and uses of that time and which led into the Mississippi, we deem it justifiable to hold, and do hold, that, *while the stream is not now navigated in fact anywhere in Kansas, it has nevertheless, not ceased to be a highway set apart by national act and declaration for public use in the manner and at the time to be determined upon by the Federal Government.*"

37. See Wear v. Kansas, 245 U. S. 154.

In the case of *Vickory* v. *Yahola Sand and Gravel Co.*, 158 Okl. 122, the Oklahoma Supreme Court expressly reaffirmed the *Nolegs* decision, subject only to the modification that it does not apply to portions of the Arkansas River bed which were expressly conveyed by the United States to Indian tribes prior to statehood. The court said:

> "It will be observed that the general rule announced in the *Nolegs* case to the effect that the ownership of the navigable waters and the soil under them within the present boundaries of the State of Oklahoma is in the state, as announced by the District Court in the *Brewer-Elliott* case, *supra*, that 'a state takes title to the bed of navigable streams in its borders, and, subject to the paramount authority of Congress to control navigation in the regulation of interstate and foreign commerce, may appropriate and dispose of minerals found in the beds of such streams,' *has never been repudiated or disputed in any of the cases cited*, except perhaps to say that Congress had the power before statehood to convey by grant any of such lands, whenever it became necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory."

PROPOSITION 5.

This Court applied the above stated principles in *Wear* v. *Kansas*, 245 U. S. 154, and in that case upheld the title of the State of Kansas to the bed of the Kansas River under circumstances identical with those in the case at bar.

The case of *Wear* v. *Kansas* concerned the title to the

bed of the Kansas River which is a smaller river than the Arkansas and is admittedly non-navigable in fact.[38]

The State of Kansas had passed a statute regulating the sale of sand from the beds of the navigable rivers of the state and providing for the payment to the state of royalties for all sand thus sold. The action in question was brought in the state court under the title of *State* v. *Akers* (92 Kan. 169), against the state treasurer and certain riparian owners to test the constitutionality of the statute. The riparian owners claimed that the Kansas River was not navigable in fact and that they, the riparian owners, owned the bed and that the State of Kansas had no title to the bed or to the royalties therefrom.

The state court refused to hear evidence, took judicial notice of the navigability of the stream, and held that the state owned the bed to the exclusion of the riparian proprietors for the reason, in the language of the court:

> "That Kansas entered the Union upon an equal footing with the other states; that upon her admission into the Union absolute property in and dominion and sovereignty over the soils under the navigable *and public streams* within its limits passed to the state, in trust for all the people, subject to the superior rights of the Federal government with respect to navigation."[39]

The Supreme Court of the United States in *Wear* v. *Kansas, supra,* affirmed the state court in all respects.

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38. See Hurst v. Dana, 86 Kan. 947, in which the Kansas Supreme Court said:

> "For a generation or more land transportation has so far superseded the use of water craft in this region that even the Missouri, a stream known to be navigable in fact and in law, has ceased to float upon its waters along the boundary of this state any appreciable commerce of the country, *and the Kansas which we have judicially noticed as navigable* (Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330), *floats none at all.*"

39. State v. Akers, 92 Kan. 169.

The opinion in *Wear* v. *Kansas* shows, that one of the riparian owners made the contention that the river was navigable because the Territorial Legislature had adopted the common law of England, and that the other riparian owner, Fowler, contended squarely that the river was not navigable in fact. The court said:

> "This case was decided on a motion to quash the answers, the allegation of which, so far as now material, may be summed up as follows: In 1859, the Territorial Legislature of Kansas enacted that the territory should be governed by the common law of England, which still remains the law of the state. On October 1, 1860, the United States conveyed land adjoining the Kansas River to the predecessor in title of the plaintiffs in error, and, as the tides do not ebb and flow in the river, *they allege that the conveyance carried title to the middle of the stream.*
>
> • • • • • • • •
>
> "But the plaintiff in error, Fowler, while adopting this allegation, *alleges that it is not and never has been a navigable stream,* and in 1864 the Kansas legislature made a declaration to that effect."

The court then considered the contention that the river was non-navigable under the common law and in the following language expressly denied that the patents carried to the center of the stream under such theory:

> "The argument of the plaintiffs in error does not need a lengthy response or a statement of all the answers that might be made to it. *It was said that the territorial statute gave to the patent of the United States the effect of a grant ad filum aquae. But this attributes to detailed and precise an effect to a general provision of law.*"

The court went on to say that no riparian rights could

have been acquired under the territorial law in excess of those later granted by state law. The court said:

> "We should be slow to believe that a state beginning its organized life with an express adoption of the common law of England stood any differently from one where the common law was assumed to prevail because the citizens were of English descent. Therefore, when the Supreme Court of Kansas regards the principle of the common law to be that the fact of navigability, not the specific test of navigability convenient for England, is what excludes riparian ownership of riverbeds, *it is impossible for us to say that the territorial statute even purports to give greater rights.*"

The riparian owners then contended that if navigability in fact were to be considered the test in Kansas, the riparian owners were entitled to a jury trial, so as to determine by the evidence whether the Kansas river was navigable in fact.

The Supreme Court also overruled this contention in the following expressive language of Justice HOLMES which seems to contain the gist of the decision:

> "Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact as it was in 1860, the date of the original grant, and the Supreme Court of the state was not entitled to take judicial notice that the river was navigable at Topeka. But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state, we certainly cannot pronounce it error. *In this aspect it is a question of state law.* (Citing cases.) *The fact is of a kind that should be established once for all, not perpetually re-tried.*"

The Supreme Court did not deem it necessary to state the reason for the rule that territorial laws cannot be invoked to carry a riparian title to the center of the stream. However, the Kansas Court gave as its reason, for the rule, "That Kansas entered the Union upon an equal footing with the other states," and since the Supreme Court affirmed the decision of the state court, it must be assumed that it approved the state's reason for the rule.

The right to define the riparian titles of private owners within its boundaries is undoubtedly the prerogative of each state, but if the territorial government prior to statehood, were allowed to anticipate the authority of the state which is later to be created and were allowed to promulgate its own rule of property defining the rights of riparian owners, the territorial government would thereby fix and determine the riparian rights of all private owners within the future state, and the state would enter the Union deprived of such prerogative and of the control of the beds of its public waters.[40]

The above reasoning was confirmed in *Kansas* v. *Colorado*, 206 U. S. 49, in which this Court rejected a contention that the laws of the Territory of Colorado, enacted prior to statehood, gave the riparian owners a vested right in the common law principle of equal use of waters. This Court said:

> "In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. (Citations.) But

40. See Haight v. City of Keokuk, 4 Iowa 213, in which the court said: "Although no state may exist at the time of such a grant, as in this case, yet grants and sales made under such circumstances are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its right when arisen." (This case was cited with approval in Barney v. Keokuk, 94 U. S. 342.)

when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states (citations), and Colorada, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation."

The Supreme Court, in *Coyle* v. *Smith*, 221 U. S. 559, held that since new states come into the Union with all of the powers of the original states, Congress could not fix the site of the state capital for the State of Oklahoma. The court said:

> "The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. *That one of the original thirteen states could now be shorn of such powers by an Act of Congress would not be for a moment entertained.*"

The court observed in that case that the same doctrine applied to the control of the states over their rivers and cited *Escanaba and L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, to the effect that:

> "Equality of constitutional right and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River."

The original states undoubtedly possessed the privilege which the State of Oklahoma is seeking in the present action and it would seem too plain for argument that territorial laws cannot be invoked to deprive any state of such privilege. The Supreme Court reached to the very roots of

our Federal system of government when it so held in *Wear* v. *Kansas.*

The decision in *Wear* v. *Kansas* was expressly affirmed in *Brewer-Elliott Oil and Gas Company* v. *United States,* 260 U. S. 77, 89, in the following language which we repeat for continuity:

> "In *Wear* v. *Kansas,* 245 U. S. 154, 72 L. ed. 214, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, to land bordering on the Kansas river, without restriction, reservation, or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a nonnavigable stream, was immaterial. In either view the result there would have been the same."

PROPOSITION 6.

***(a)* Under the authority of *Wear* v. *Kansas,* 245 U. S. 154, the Circuit Court of Appeals for the Tenth Circuit, and the United States District Court for the District of Kansas have upheld the title of the State of Kansas to the Arkansas River bed. *(b)* To deny the State of Oklahoma ownership of the bed of the same river under similar circumstances would violate the constitutional doctrine of equality of states and would deny these petitioners the equal protection of the laws.**

(a) *The Federal courts have upheld the title of the State*

of Kansas to the bed of the Arkansas River in the following cases:

Jackson-Walker Coal and Material Company v. *Hodges,* (U. S. D. C. Kan.) 283 Fed. 457:

"While, from a consideration of the proof taken and submitted in this case, and from that general knowledge common to all men, *there can be no possible doubt whatever the Arkansas River at the point in controversy in this case is not now, and has not, since its known history, been navigable in point of fact;* that is to say, the stream in its ordinary condition does not afford a channel for useful commerce, hence is not navigable within the meaning of Acts of Congress on that subject as defined in the *Montello,* 20 Wall. 430, 22 L. ed. 391; *Leovy* v. *United States,* 177 U. S. 621, 20 Sup. Ct. 797, 44 L. ed. 914; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136; *South Carolina* v. *Georgia,* 93 U. S. 4, 23 L ed. 782; *The Robert W. Parsons,* 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73, and many other cases. *However, from what has gone before, it must, I think be held, in this case, the navigability of the stream in point of fact is not the true test.* On the contrary, the true test is whether the Arkansas River at the *locus in quo* must be regarded as navigable under the local laws of the State of Kansas, as ordained and established for the purpose of the unvarying determination of the property rights of riparian owners along its course through the state. *That by the local property rule established in this state, once for all, the title to the bed of the Arkansas River within the state is vested in the state and not in the adjoining riparian owner."*

No appeal was taken from this decision.

Shore v. *Shell Petroleum Corporation,* (U. S. D. C. Kan.) 55 F. (2d) 696:

"The difficulty with the argument is that the Indians did not own the fee title, that plaintiffs did not

deraign their title from the Indians, *and that the question of navigability in fact is not the true test with which we are confronted.* It appears to be well settled that where the litigation over the property rights is *between private parties, the local law regarding navigability controls,* and so the question here is not whether the Arkansas River in Kansas was navigable in fact prior to the issuance of the patents to the riparian owners, but whether under the law and public policy of the state it was deemed to be navigable."

The above decision was affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, 60 F. (2d) 1, in the following language:

> "In *Wear* v. *Kansas,* 245 U. S. 154, 38 S. Ct. 55, 62 L. ed. 214, Ann. Cas. 1918B, 586, it was held that, if a state court takes upon itself to know without evidence whether a river is navigable, a Federal court cannot say it erred. And in *Donnelly* v. *United States,* 228 U. S. 243, 262, 33 S. Ct. 449, 455, 57 L. ed. 820, Ann. Cas. 1913E, 710, the court said:
>
> > 'But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states.'
>
> "See, also, *Jackson-Walker Coal & Material Co.* v. *Hodge,* (D. C.) 283 F. 457. *So we apply in this case the rule of property established by the Supreme Court of Kansas."*

Certiorari was denied in this case, 287 U. S. 656.

(b) *To deny the State of Oklahoma ownership of the bed of the same river under similar circumstances would violate the constitutional doctrine of equality of states.*

This "doctrine of the equality of the States" has been confirmed by the Supreme Court on numerous occasions.

In *Escanaba Transportation Company* v. *Chicago*, 107 U. S. 688, the court held that the limitations upon the territories northwest of the Ohio River, as contained in the Ordinance of 1787, ceased to have any operation or effect upon the State of Illinois or upon any of the other states carved out of such territory, upon their admission as states. The court said:

> "Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, *it ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union. On her admission she at once became entitled to and possessed all of the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them.* The language of the Act of Admission is 'on an equal footing with the original states in all respects whatever.' 3 Stat. at L. 536. '*Equality of constitutional right and power is the condition of all the States of the Union, old and new*'." (Quoted with approval in *Cardwell* v. *American River Bridge Co.*, 113 U. S. 210; *Huse* v. *Glover*, 119 U. S. 546, and *Ware* v. *Race Horse*, 163 U. S. 513.)

The court further said in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 9:

> "On the admission of any such new state, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them."

The same rule was stated in *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 434, as follows:

> "*There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and*

exercise over persons and subjects within their respective limits."

The language in this opinion is applicable to the situation of the States of Oklahoma and Kansas with reference to the Arkansas River. As the court said, there can be no distinction between these two states in the "character of the jurisdiction, sovereignty, and dominion which they may possess and exercise" over the title of the riparian owners to the bed of the Arkansas River, these being "persons and subjects within their respective limits."

The court further said, in *Bolln* v. *Nebraska*, 176 U. S. 89:

"The idea that one state is debarred, while the others are granted the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution that it cannot be entertained even if Congress had power to make such discriminations."

This language is also applicable to the case at bar, for it may be here said with equal effect that the idea that the State of Oklahoma may be debarred from the privilege of determining the title to the bed of the Arkansas River, as between the state and private riparian owners, while the State of Kansas is granted such privilege, "is so repugnant to the theory of their equality under the Constitution that it cannot be entertained even if Congress had the power to make such discrimination."

The most complete statement of the doctrine of the equality of states is found in *Coyle* v. *Smith*, 291 U. S. 589. The Federal Enabling Act by which Oklahoma was admitted as a state contained a provision that the capital of the state should remain at Guthrie until 1913. The State Legislature, however, enacted a statute in 1910 providing for

the immediate removal of the capital from Guthrie to Oklahoma City. The Supreme Court held that the location of the state capital was entirely within the sovereign powers of the state and that the Federal Act had no binding force or effect whatever upon the State of Oklahoma.

The Court, in its discussion of the doctrine of equality of states, said:

> "The definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution—a definition emphasized by the terms employed in all subsequent Acts of Congress admitting new states into the Union. The first two states admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. *Each act declares that the state is admitted 'as a new and entire member of the United States of America.'* Stat. at L. 191, 189, Chap. 7, 4. Emphatic and significant as is the phrase, 'admitted as an entire member,' even stronger was the declaration upon the admission in 1796 of Tennessee (1 Stat. at L. 491, Chap. 47) as the third new state, it being declared to be 'one of the United States of America,' 'on an equal footing with the original states in all respects whatsoever'—phraseology which has ever since been substantially followed in admission acts, *concluding with the Oklahoma Act, which declares that Oklahoma shall be admitted 'on an equal footing with the original states'.*"

The Oklahoma rule of property expressed in *State* v. *Nolegs*, 40 Okl. 479, is identical with that by which the State of Kansas acquired title to the same river, and was promulgated only two years after the Kansas decision. The people of Oklahoma, moreover, are motivated by the same desire that the river bed should serve the public as were the people of Kansas and the royalties derived from the

lease in this case, being the property of the common school fund of this state, will provide education for the school children of Oklahoma. It would be difficult for Oklahoma to understand why its people should be deprived of such benefits in face of the fact that similar benefits have been judicially awarded to her sister state.

The procedure adopted by the State of Kansas to successfully assert title to the Arkansas River was based upon constitutional principles approved by this court, and we most earnestly plead that to deny the State of Oklahoma the ownership of the bed of the same river under identical procedure and circumstances, would violate the constitutional doctrine of equality of states, and would be so inequitable as to offend every principle of natural justice.

Respectfully submitted,

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